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No. 79-1344

IN THE

Supreme Court of the United States

October Term, 1980

MICHAEL M.,

Petitioner,

vs.

THE SUPERIOR COURT OF SONOMA COUNTY, THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondents.

On Writ of Certiorari to
The Supreme Court of California

BRIEF OF RESPONDENT.

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BRIEF OF RESPONDENT.

Summary of Argument.

The gender-based classification in California Penal Code section 261.5 serves the important governmental interest of deterring teenage pregnancies. The widespread problem of teenage pregnancy is a matter of great concern to the State of California in light of the disastrous physical and social consequences which are suffered by the adolescent mother and her child.

The California Supreme Court's conclusion that pregnancy prevention is the legislative purpose supporting the statute should be accepted as a correct analysis of state law. Earlier pronouncements of legislative purpose were devoid

of evidence of express legislative intent and therefore not entitled to great weight. Legislative purpose should be analyzed in light of presently identifiable governmental interests, rather than turning upon difficult questions of legislative history of statutes passed in earlier centuries. The California Legislature's subsequent refusal to enact a gender-neutral statute, in any event, is legislative acceptance of the purposes set forth by the California Supreme Court.

The classification in the statute serves the important governmental interest of pregnancy prevention by protecting the victim from the very act necessary to conception. Because virtually all of the significant harmful consequences of teenage pregnancy fall upon the young female, the Legislature has rationally elected to provide punishment for the participant who, by nature, suffers none of the burdens of his conduct. Viewed as part of a scheme of protection for all minors, California Penal Code section 261.5 rationally focuses on the fact the sexes are not similarly situated for purposes of the statute.

The statutory classification is not overinclusive although use of birth control devices or infertility do not constitute defenses, because the risk of teenage pregnancy and its frequent occurrance alone are sufficient to justify the statute. Petitioner has never alleged himself to have used birth control devices or to be infertile, so he lacks standing to challenge the statute on the basis those conditions must constitute a defense. The state is not constitutionally compelled to adopt a gender-neutral statute, although some states have elected to do so, and statutes similar to California's unlawful sexual intercourse provision have repeatedly been upheld.

The unique potential for physical harm to the pre-pubescent or physically immature female also justifies the statutory classification. Young females are uniquely subject to

physical injury from sexual intercourse, and a statute which recognizes this fact serves important governmental interests.

The statute is constitutionally applied to petitioner, who utilized his apparent physical superiority to force the victim to submit to intercourse. There is no evidence that the statute is ever applied in a situation where an older minor female is the sexual aggressor in an act of intercourse with a younger boy, and because that is not the factual setting of the instant case, petitioner lacks standing to challenge the statute as applied in that hypothetical situation. The statute is commonly employed in situations involving force, prostitution, pornography or coercion due to status relationships, and the state's interest in these situations is apparent.

ARGUMENT.

INTRODUCTION.

California Penal Code section 261.5 defines the offense of unlawful sexual intercourse as "an act of sexual intercourse accomplished with a female not the wife of the perpetrator, where the female is under the age of 18 years." (Cal. Stats. 1970, ch. 1301, §2, p. 2406; Cal. Pen. Code §261.5.) Although challenged by petitioner on equal protection grounds, the statute is in fact a valid exercise of legislative prerogative in assessing the physical, social and psychological differences between the sexes. In view of the undeniable disparity in the situations of minor males and females in regard to sexual intercourse, California Penal Code section 261.5 represents a rational and justifiable legislative response to demonstrable problems in the state.

California Penal Code section 261.5 is uniquely different from the gender based classifications previously considered by the Court. The classifications in earlier cases have generally been involved in an economic setting. (See, *e.g.*, *Wengler v. Druggists Mutual Ins. Co.* (1980) .... U.S. .... , 64 L.Ed.2d 107, 100 S.Ct. 1540; *Orr v. Orr* (1980) 440 U.S. 268, 59 L.Ed.2d 306, 99 S.Ct. 1102; *Califano v. Goldfarb* (1977) 430 U.S. 199, 51 L.Ed.2d 270, 97 S.Ct. 1021.) The recognition of the biological distinctions between minor males and females found in California's unlawful sexual intercourse provision is not based upon archaic stereotypes, but rather is founded upon the promoting of important and compelling governmental interests.

I.

CALIFORNIA PENAL CODE SECTION 261.5 IS FOUNDED UPON THE IMPORTANT GOVERNMENTAL OBJECTIVE OF PREVENTING TEENAGE PREGNANCY.

The gender-based classification scheme in California Penal Code section 261.5, which affords protection to fe-

males under the age of 18 years, is valid if it serves "important governmental objectives" and is "substantially related to the achievement of those objectives." (*Craig v. Boren* (1976) 429 U.S. 190, 197, 50 L.Ed.2d 397, 97 S.Ct. 451.) The principal governmental objective supporting California's unlawful sexual intercourse provision is the prevention of pregnancy in unwed females aged 17 years and under.

A. The Prevention of Teenage Pregnancy as an Important Governmental Interest.

While petitioner concedes the compelling governmental interest in prevention of teenage pregnancy (Brief of Petnr., p. 20), it is nonetheless important to set forth the scope of the problem, which places the statutory classification in proper perspective. The Supreme Court of California below noted the severity of the problem in California, as demonstrated in figures from 1971 through 1976 indicating that 83.6% of the 4,860 children born to girls under the age of 15 in California were illegitimate. For children born to girls between 15 and 17 years of age in the same period, 51% were out-of-wedlock. (*Michael M. v. Superior Court* (Cal. 1979) 25 Cal.3d 608, 611, 601 P.2d 572, 574.) The Court further observed that teenagers utilized a disproportionate amount of abortion services, accounting for 34.7% of all legal abortions in California in 1976, while accounting for only 21% of the pregnancies. (*Ibid.*) Finally, the Court recognized the increased medical and social problems attendant to teenage pregnancy. (*Id.*, at pp. 611-612.)

Unintended teenage pregnancy is now generally recognized as one of America's critical personal and social problems. ("The Legitimacy Status of First Births to U.S. Women Aged 15-24, 1939-1978," 12 Family Planning Perspectives, p. 19 (Jan./Feb. 1980).) Statistics indicate that young mothers between the age of 15 and 19 are twice as

likely to die from hemorrhage and miscarriage as are mothers in their 20's, while the death rate from complications of pregnancy and birth is 60% higher among mothers under 15. (Francke, *The Ambivalence of Abortion*, p. 183 (Random House 1978).) Because the teenage mother's body is still growing and immature, she is more likely than any other age group to suffer from toxemia (blood poisoning), anemia, premature labor, prolonged labor, and premature end to growth of arms and legs. ("Teenage Pregnancy: The Problem Worsens," August 1978 Bulletin of California Woman, issued by the California Commission on the Status of Women.)

The offspring of teenage women are no better off. Babies born to 15-year-old mothers are twice as likely to die as babies born to mothers between the ages of 20-24. (Francke, *The Ambivalence of Abortion, supra*, at pp. 183-184.)

Severe social ramifications as well befall the teenage mother. Eight out of ten who first become mothers at age seventeen or younger never complete high school. ("Teenage Pregnancy, Everybody's Problem," p. 2, DHEW Publication No. (HSA) 77-5619.) Because of educational deficiencies and the responsibility of parenthood, employment opportunities are limited. (10 Family Planning Perspectives, p. 223 (July/Aug. 1978),) It is estimated that 60% of adolescent mothers aged 15 to 17 are on welfare within two to five years of the birth of their children. ("Teenage Pregnancy, Everybody's Problem," *supra*, at pp. 3-4.) Because forced marriages tend to be unstable, there is a divorce rate three to four times higher for those married in their teens than those married in later ages. (*Id.*, at p. 4.) Children of adolescent parents are more likely to come from single parent homes, score lower on aptitude tests and to repeat their parents in early childbearing. ("Children as Well as Adolescent Parents Pay a Price for Parent's Precocious Child-

bearing," Family Planning Perspectives, pp. 198-199 (May/June 1979).) Clearly the problem of unwanted teenage pregnancy is one of monumental proportions and was properly perceived by the Supreme Court of California.

B. The Legislative Purpose Is the Prevention of Pregnancy.

Petitioner and amici curiae American Civil Liberties Union urge the Court to reject the California Supreme Court's conclusion that the legislative purpose behind California Penal Code section 261.5 is the prevention of pregnancy in unwed teenagers. (Brief of the Petnr., pp. 24-25; Brief of Amici Curiae Amer. Civ. Liberties Union, pp. 12-14.) Both parties contend that the purpose of the statute is to preserve the virtue of young girls, which constitutes an impermissible justification for the statute.

The California Supreme Court is the ultimate arbiter of California law, and its determination of statutory intent should be given careful consideration. (*Reitman v. Mulkey* (1967) 387 U.S. 369, 376-379, 18 L.Ed.2d 830, 87 S.Ct. 1627.) It is true that the Court has examined and rejected a state's highest court's reasoning on legislative purpose. (*Eisenstadt v. Baird* (1972) 405 U.S. 438, 447-452, 31 L.Ed.2d 349, 92 S.Ct. 1029.) More recently the Court has commented that it need not in equal protection cases accept at face value assertions of legislative purpose "when an examination of the legislative scheme and its history demonstrates that the asserted purpose *could not* have been a goal of the legislation." (Emphasis added, *Weinberger v. Wiesenfeld* (1975) 420 U.S. 636, 648 fn.16, 43 L.Ed.2d 514, 95 S.Ct. 1225.) Because it cannot be shown the pregnancy prevention "could not" be a goal of the Legislature in enacting California Penal Code Section 261.5, the Court

should defer to the judgment of the California Supreme Court on the matter.

The offense of statutory rape can be traced to the Statutes of Winchester in 1275 which established the age of consent at 12 years. (3 Edw. I, ch. 13.) The age was lowered to 10 by Parliament (18 Eliz. ch. 7) in 1576. (4 Blackstone Commentaries 212; *State v. Rundlett* (Me. 1978) 391 A.2d 815, 819 fn.14.) The offense of statutory rape was part of the first Penal statute in California (Cal. Stats. 1859, ch. 99, §47, p. 234), and was subsequently codified in former California Penal Code section 261(1) in 1872. The age of consent was initially established at 10, but was raised to 14 in 1889 (Cal. Stats. 1889, ch. 191, §1, p. 223), to 16 in 1897 (Cal. Stats. 1897, ch. 139, §1, p. 201) and finally to 18 in 1913 (Cal. Stats. 1913, ch. 122, §1, p. 212.) In 1970 the California Legislature removed the offense from the rape provision of California Penal Code section 261, and enacted section 261.5, defining the offense of "unlawful sexual intercourse." (Cal. Stats. 1970, ch. 1301, §2, p. 2406.)[1] None of these enactments contain express statements of the legislative purpose.

The previous declarations of legislative intent by the Supreme Court of California, upon which petitioner relies, are

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[1]Petitioner is therefore before the Court seeking to invalidate a statute with a historical precedent of 700 years. In addressing a contention that 18 United States Code section 2421, commonly known as the Mann Act, was unconstitutional on the ground it contained an impermissible gender-based classification in that only females are protected, the Eighth Circuit commented that "[i]t is rather late in the history of the Mann Act to still be contending for its unconstitutionality." (*United States v. Garrett* (8th Cir. 1975) 521 F.2d 444, 446.) Certainly if it is "rather late" to be challenging the validity of the Mann Act, in the words of the Court in *Garrett*, where there had been "over 60 years since its enactment" (*ibid.*), it follows that petitioner's challenge to California Penal Code section 261.5, with its roots traced to the 13th Century, should similarly be rejected.

totally devoid of reference to express legislative intent. (See *People v. Hernandez* (Cal. 1964) 61 Cal.2d 529, 531, 393 P.2d 673; *People v. Verdegreen* (Cal. 1895) 106 Cal. 211, 214, 39 P.2d 607.) Thus the prior California Supreme Court holdings that the legislative purpose was to protect the virtue of the young female are not persuasive in view of the absence of any citation to actual legislative intent.

Moreover, a logical inference can be drawn that pregnancy prevention was a concern of the Legislature as it increased the age of consent from 10 years to 14, 16, and finally 18 years. The most recent legislative change, the abolition of the offense of statutory rape found in former California Penal Code section 261, and the creation of the offense of unlawful sexual intercourse in 1970, came at a time when teenage pregnancy was a problem of well known and substantial proportion in California. It cannot be assumed that the California Legislature did not have the problem of pregnancy prevention in mind at the time California Penal Code section 261.5 was enacted.

The prior holdings of the California Supreme Court are not only devoid of support in legislative history, but were probably incorrect in light of the consistent absence of a chastity requirement in California's prior or existing statute. In those states which made chastity an element of statutory rape, the legislative purpose may be assumed to include preserving the virtue of young girls. The absence of a chastity qualifier indicates that the state was concerned with an objective other than preserving the virtue of underage females. (*State v. Rundlett, supra*, 391 A.2d at p. 820.)

In view of the questionable merit of the statements of legislative intent in early California Supreme Court opinions, the Court below was free to address the issue anew. Indeed, the state's highest court may not only interpret its statutes, but it may also *reinterpret* state law. (*Garner v.*

Louisiana (1961) 368 U.S. 157, 169, 7 L.Ed.2d 207, 82 S.Ct. 248.) The power to reinterpret should include the right to reassess legislative purpose in light of conditions now present.[2]

The intermediate level of equal protection analysis should not be viewed as requiring proof of a legislative purpose revealing an important governmental interest at the time of enactment. The more apt inquiry is whether the statutory classification under attack serves an identifiable important governmental interest at the present time. Certainly where there is a present identifiable important governmental interest which supports a classification scheme, it would be anomalous to strike down a statute on the basis that at the time of enactment a different legislative purpose existed.

This view was cogently and expressly embraced in the concurring opinion in *Rundlett v. Oliver* (1st Cir. 1979) 607 F.2d 495, 504 fn.3 (Campbell, Cir. Judge, conc.) in which Maine's former statutory rape law was upheld. The concurring opinion noted that statutes should not be tainted simply by the fact they were enacted in earlier times when a different morality was acceptable. The more apt inquiry is "whether in today's world we can discern a substantial relationship between the statutory classification and a governmental objective important enough to sustain such a gender-based classification." (*Ibid.*) While history may be important in a court's judgment, "far more important is a court's perception of the world around it, and the current interests reasonably to be served." (*Ibid.*) In view of petitioner's concession that "the prevention of teenage pregnancy is a compelling interest in every state" (Brief of

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[2]The power of the state court in this regard is no different from this Court's power to reinterpret the Constitution and to overrule its prior erroneous holdings. (See *Edelman v. Jordan* (1974) 415 U.S. 651, 671, 39 L.Ed.2d 662, 94 S.Ct. 1347.)

Petnr., at p. 20), respondent submits that the crucial inquiry in the instant case is not the historical underpinning of the statute, but rather whether the statutory classification is substantially related to presently identifiable governmental interests.

Assuming some indication of current legislative purpose is necessary, respondent submits that it can be found in recent action by the California Legislature. Following the declaration of legislative purpose by the Supreme Court of California below, bills were introduced in the California Assembly and Senate which would have in part amended California Penal Code section 261.5 to render it gender-neutral. (Assem. Bill 1588, Cal. Leg., 1979-1980 Reg. Sess.; Sen. Bill 2045, Cal. Leg., 1979-1980 Reg. Sess.) Neither bill met with success in the California Legislature and both are considered dead. (See Cal. Assem. Weekly History, July 17, 1980, p. 327; Cal. Sen. Weekly History, July 12, 1980, p. 622.) In the same legislative session, California's forcible rape provision was amended to be gender-neutral. (Cal. Stats. 1979, ch. 994, p. .... , §1; Cal. Pen. Code §261.)

Respondent submits that defeat of the proposed amendments to California's unlawful sexual intercourse provision, in the same session in which California's forcible rape law was made gender-neutral, amounts to a legislative declaration of acceptance of the purposes most recently stated by the Supreme Court of California in upholding the statutory classification. The California Legislature is presumed to be aware of existing judicial decisions. (*Kusior v. Silver* (Cal. 1969) 54 Cal.2d 603, 618, 354 P.2d 657.) Where a statute has been construed by judicial decision, and that construction is not altered by subsequent legislation, it must be presumed in California that the Legislature is aware of the judicial construction and approves of it. (*People v. Hall-*

ner (Cal. 1954) 43 Cal.2d 715, 719, 277 P.2d 393; *People v. Fox* (Cal. 1977) 73 Cal.App.3d 178, 181, 140 Cal.Rptr. 615.) Thus if a statement of legislative purpose is necessary, it can be found in the California Legislature's implied approval of the reasoning of the Supreme Court of California.

In addition to its recent acceptance of the reasoning of the Supreme Court of California, the California Legislature in 1967 recognized the relationship between the state's former statutory rape provision and the need to deter teenage pregnancy in adopting the California Therapeutic Abortion Act. (Cal. Stats. 1967, ch. 327, p. 1535, §1; Cal. Health and Saf. Code §25950 et. seq.) Under the Therapeutic Abortion Act, an abortion was a matter of right for those statutory rape victims under the age of 15 years, and was permissible for those victims 15 years of age and older. (Cal. Health & Saf. Code §25952, subds. (a)-(c); former Cal. Pen. Code §261, subd. (1).) The provisions of the Therapeutic Abortion Act reflect a legislative acceptance of pregnancy prevention as a purpose of the former statutory rape provision, by allowing for abortions where pregnancy resulted from a violation of former California Penal Code section 261(1). The legislative approach was intended to deter pregnancies through the statutory rape law, but if the section 261(1). The legislative approach was intended to available. It is reasonable to conclude that the California Legislature perceives pregnancy prevention as a purpose of its statutory rape provision in view of the enactment of the Therapeutic Abortion Act of 1967.

The California Supreme Court below, cognizant of the gravity of the problem of teenage pregnancy, was free to infer that the current legislative purpose supporting California Penal Code section 261.5 was the prohibition of the act which is a condition precedent to the pregnancy itself. There is certainly no indication that the California Legis-

lature disagrees with this reasoning. Respondent urges the Court to afford the determination of the Supreme Court of California the "careful consideration" it deserves, and to adopt its recognition of pregnancy prevention as the legislative purpose supporting the enactment of California Penal Code section 261.5.

C. The Classification Scheme Is Substantially Related to the Prevention of Teenage Pregnancy.

There are disastrous physical, social and psychological effects which fall exclusively upon the teenage mother. No similar demonstrable harm is suffered by the father, whether he is pre- or post-adolescent. Recognizing the totally disparate consequences which befall the unwed teenage mother, the California Legislature has sought to protect the underage female, the victim, from these consequences by prohibiting any male from engaging in the act necessary for conception. The allocation of liability in the male participant in an act of sexual intercourse is "substantially related" to the undeniable dissimilarity in the consequences of pregnancy to the minor female victim and the male participant. (See *State v. Rundlett, supra,* 391 A.2d at p. 822; *State v. Gray* (Ariz. 1979) 122 Ariz. 445, 447, 595 P.2d 990, 992.)

This Court has recognized that where the sexes are not similarly situated there is no constitutional prohibition to a classification based upon gender. (*Parham v. Hughes* (1979) 441 U.S. 347, 354-355, 60 L.Ed.2d 269, 99 S.Ct. 1742 (Opn. of Stewart, J.); *Schlesinger v. Ballard* (1975) 419 U.S. 498, 508-509, 42 L.Ed.2d 610, 95 S.Ct. 572.) Because only the minor female can become pregnant, the sexes are not similarly situated for purposes of statutory rape laws, and the special protection afforded the victim is not violative of the concept of equal protection. (*People v. Salinas* (Colo. 1976) 191 Colo. 171, 174, 551 P.2d 703,

705-706; *State v. Drake* (Iowa 1974) 219 N.W.2d 492, 496.) Once it is accepted that the purpose of protecting the minor female from sexual intercourse is valid, "it inevitably follows that the curbs adopted to accomplish that purpose can only be imposed against males because they are the only persons who may inflict the injury which the law seeks to avoid." (*State v. Drake, supra,* 219 N.W.2d at p. 496; see also *In re Interest of J.D.G.* (Mo. 1973) 498 S.W.2d 786, 793.)

California has a policy of protecting all minors from harmful sexual contacts. (See Cal. Pen. Code §272 (contributing to the delinquency of a minor); Cal. Pen. Code §288 (lewd and lascivious conduct on the body of a child under the age of 14); Cal. Pen. Code §647a (annoying or molesting any child under the age of 18.) This protection has been specifically applied to protect minor males from heterosexual contacts with adult women. (See *People v. Lowell* (1946) 77 Cal.App.2d 341, 343-345, 175 P.2d 846.) California Penal Code section 261.5 is therefore merely one provision in a comprehensive legislative scheme which protects all minors from sexual abuse, but which gives special recognition to the unique nature of the potential harm resulting from sexual intercourse with a female under the age of 18 years. The approach of the California Legislature is consistent with its power to address itself to what it perceives to be the most accute phase of a problem. (*Williamson v. Lee Optical Co.* (1955) 384 U.S. 483, 489, 99 L.Ed. 563, 75 S.Ct. 461.)

The California Legislature could also rationally conclude that while the teenage female is subject to the natural deterrent of fear of pregnancy, the male has no similar fear to deter his participation in sexual intercourse with minor females. In view of the natural and societal allocation of the burdens of teenage pregnancy upon the female, the state

Legislature's decision to impose liability upon the male participant was justified. Due to the natural deterrent of pregnancy in the young female, it is not appropriate to assume in this context that "the woman has been the aggressor as often as the man." (*Caban v. Mohammed* (1979) 441 U.S. 380, 404 fn.8), 60 L.Ed.2d 297, 99 S.Ct. 1760 (Stevens, J., dissenting).)

Given the severe consequences of teenage pregnancy to the young female, none of which are shared to any significant degree by the male sexual partner regardless of his age, the classification contained in California Penal Code section 261.5 is substantially related to the deterrence of tennage pregnancy by punishing the party who participates in conception but bears none of its burdens.

D. The Statutory Classification Is Not Invalid on the Basis That It Is "Overinclusive".

Petitioner argues that if the prevention of teenage pregnancy is the purpose of the statute, the classification scheme is not substantially related to the achievement of that purpose for three reasons. First, petitioner argues that the statute is over-inclusive in that it does not exempt those who use birth control devices or "those who are otherwise incapable of procreation." (Brief of Petnr., pp. 18-19.) Second, because 37 states have enacted gender-neutral statutory rape laws, "California's gender-based statute is not necessary to further the interests of that state." (Brief of Petnr., pp. 19-21.) Third, petitioner argues that the statute is rarely invoked compared to the number of violations of the statute. (Brief of Petnr., pp. 22-24.)

Petitioner's contention that the statute is "overinclusive" because it applies in situations where pregnancy cannot result is insufficient to invalidate the statute. The frequency of incidence of teenage pregnancy is sufficient enough to

justify the conclusion that a statute intended to prohibit the risk of such pregnancies is within the state's police power. The state may act to prohibit the harm before it occurs.[3] The state Legislature should not require to draft statutes with the precision suggested by petitioner.

Moreover, petitioner has not alleged or asserted that he used a contraceptive device, is infertile or otherwise unable to father a child. Petitioner is therefore urging the Court to strike down the statute on the basis of its application to a hypothetical situation. As a general rule, "[a] party has standing to challenge the constitutionality of a statute only insofar as it has an adverse impact on his own rights," but not as "applied to third parties in hypothetical situations." (*Ulster County Court v. Allen* (1979) 442 U.S. 140, 154-155, 60 L.Ed.2d 777, 99 S.Ct. 2213.) The limited exception to the standing rule in situations where broad restrictions prohibit protected speech under the First Amendment has no application in the instant case. (*Ulster County Court v. Allen, supra*, 442 U.S. at p. 155.) Indeed, the prohibition against sexual intercourse with a minor involves no recognized constitutional right, and any suggestion that minors have an unfettered constitutional right to engage in sexual intercourse has been labeled as "frivolous." (*Carey v. Population Services International* (1977) 431 U.S. 679, 702

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[3]The reasoning of the Court in *Ohralik v. Ohio State Bar Assn.* (1978) U.S. 447, 56 L.Ed.2d 444, 98 S.Ct. 1912, while in a context different from that in the instant case, supports this position. In *Ohralik*, an attorney, suspended for solicitation of a client, argued that this conduct was protected under the First and Fourteenth Amendments unless the state could show *actual harm* from the solicitation. In rejecting the contention, the Court observed that regulations "prohibiting solicitation are prophylactic measures whose objective is the prevention of harm before it occurs." (*Id.*, at p. 464.) Similarly, the California Legislature was not required to draft Penal Code section 261.5 in such a fashion that it would be violated only by acts which actually result in pregnancy. The risk of pregnancy to the unwed teenager justifies the prohibition of the act itself.

(White, J., conc.), 713 (Stevens, J., conc.).) Because the allegedly overinclusive application of California Penal Code section 261.5 has not been alleged or shown to apply to petitioner, he lacks standing to challenge the statute on that ground.

Petitioner's contention that the classification in the California Statute is "not necessary" to further the interests of the state because 37 states have enacted gender-neutral statutory rape provisions is a misapplication of the intermediate level of equal protection analysis and ignores the repeated rulings of state and federal courts upholding statutes protecting only minor females.[4] Under the intermediate level of equal protection analysis, the state is not required to show that its gender-based classification is necessary, as appellant argues. The appropriate test requires a showing that the classification is "substantially related" to the achievement of the governmental objective. (*Orr v. Orr, supra*, 440 U.S. at p. 279, 59 L.Ed.2d 306, 99 S.Ct. 1102; *Craig v. Boren, supra*, 429 U.S. at p. 197.) The requirement

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[4]In addition to the California Supreme Court below, the following authorities have rejected arguments that statutory rape laws are unconstitutional: (*Rundlett v. Oliver* (1st Cir. 1979) 607 F.2d 495, 497-503; *State v. Gray* (Ariz. 1979) 122 Ariz. 445, 595 P.2d 990, 992; *Barnes v. State* (Ga. 1979) 244 Ga. 302, 303-305, 260 S.E.2d 40, 41-42; *Olson v. State* (Nev. 1979) 95 Nev. Adv. 1, 588 P.2d 1018, 1019; *State v. Wilson* (N.C. 1979) 296 N.C. 298 311-313; 250 S.E.2d 621, 629-630; *State v. Brothers* (Del. 1978) 384 A.2d 402, 405-406; *State v. Rundlett, supra*, 391 A.2d at pp. 817-822; *State v. Housekeeper* (Utah 1978) 588 P.2d 139, 141; *People v. MndangePfupfu* (N.Y. 1978) 97 Misc.2d 496, 411 N.Y.S.2d 1000, 1002-1006; *Ex Parte Groves* (Tex. 1978) 571 S.W.2d 888, 890-892; *State v. Thompson* (N.J. Super. 1978) 162 N.J. Super. 302, 304-306, 392 A.2d 678, 680-681; *Hall v. McKenzie* (4th Cir. 1976) 537 F.2d 1232, 1234-1235; *People v. Salinas* (Colo. 1976) 191 Colo. 171, 174, 551 P.2d 703, 705-706; *State v. Meloon* (N.H. 1976) 116 N.H. 669, 670-671, 366 A.2d 1176, 177; *People v. Mackey* (Cal. 1975) 46 Cal.App.3d 755, 760, 120 Cal.Rptr. 157, cert. den. 423 U.S. 951; *State v. Drake* (Iowa 1974) 219 N.W.2d 492, 495-496; and *In re Interest of J.D.G.* (Mo. 1973) 498 S.W.2d 786, 792-793.)

of necessity urged by petitioner is accordingly not applicable, nor is every state constitutionally compelled to enact a gender-neutral statute.

Indeed, there are substantial drawbacks to a gender-neutral statute. In situations involving two minors, neither minor would be likely to make a complaint since to do so would be self-incriminating. Thus a gender-neutral statute would probably result in fewer prosecutions. If immunity were granted to one of the participants, most cases would be likely to require lengthy hearings in already burdened trial courts to determine whether there was a discriminatory prosecution. A gender-neutral statute does not offer the promise of legislative perfection assumed by petitioner.

Appellant's further argument that the classification does not serve any important governmental interest because it is frequently violated[5] but results in few prosecutions is a non-sequitur. The importance of a statute is its deterrent effect, which may be difficult or impossible to prove through empirical data. Certainly one would not argue that forcible rape statutes do not serve an important governmental objective because the incidence of the offense is increasing, it is not frequently reported to authorities and prosecutions are dif-

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[5]Petitioner has extrapolated that some 36,000,000 violations of California Penal Code section 261.5 occurred in 1975 based upon statistics drawn from a study of adolescent sexuality. (See Sorensen, *Adolescent Sexuality in Contemporary America* (World Publishing 1973) pp. 122-124.) While that study did indicate that 45% of all adolescent females had engaged in sexual intercourse, the term "adolescent" included females as old as 19 years of age. (*Id.*, at p. 27.) Due to the inclusion of 18 and 19-years olds in the study, it is not statistically relevant to the instant case because the statute in question applies only to those 17 years of age and younger. It is fair to assume that the females in the study over the age of 17, and outside the scope of the statute, make up a disproportionately high percentage of the 45% of adolescent non-virgin females, as opposed to the group of females between the ages of 13 and 17 years. The asserted 36,000,000 violations of the statute in 1975 is doubtful.

ficult. The more apt inquiry is whether a statute is reasonably intended to deter conduct which may be proscribed under the state's police power. The various statutory rape laws in the United States have repeatedly been upheld as such valid legislative judgments. (See fn. 4, *supra*.)

Finally, the statute is invoked more frequently than suggested by petitioner. It is true that California has not published juvenile arrests for unlawful sexual intercourse in its yearly Criminal Justice Profile. However, the statistics are maintained and indicate as follows:

Year	Total Adult Arrests	Adult Male	Adult Female	Juvenile Arrests	Juvenile Male	Juvenile Female
1975[6/]	475	381	6	87	69	18
1976	336	306	0	72	62	10
1977	324	316	0	59	56	3
1978	274	273	1	66	58	8
1979	298	296	2	52	49	3

These statistics indicate that the statute is enforced on a regular basis in California. The statistics also reflect that females are arrested for unlawful sexual intercourse, presumably on the theory they aided or abetted in the commission of the offense and therefore are culpable as principals under California Penal Code section 31. A female may be convicted of unlawful sexual intercourse in California as an aider and abettor. (*Cf. People v. Hernandez,*

[6/]The figures for the 1975-1977 adult arrests by sex are somewhat understated, as indicated by the fact that the sum of the adult male and adult female arrests for those years is less than the number of total adult arrests. Complete reporting of all arrests by sex is indicated in the 1978-1979 statistics. The above data is maintained by the California Department of Justice Bureau of Criminal Statistics pursuant to California Penal Code section 13020.

18 Cal.App.3d 651, 657, 96 Cal.Rptr. 71, holding a female guilty of rape on an aiding and abetting theory.) The statute is therefore neutral as the possible perpetrators, although the participation of a male would be necessary in any case.

The contention of Amicus Curiae Women's Legal Defense Fund (at p. 5), that the California unlawful sexual intercourse provision is not directed toward the prevention of pregnancy because "only penetration and not emission" is necessary to complete the offense" is without merit.[7] Pregnancy can result from intercourse which does not culminate in male ejaculation. (T. Tucker, *Birth Control* (Tobey Publ. Co. 1975) p. 130; L. L. Langley, *Contraception* (Dawden, Hutchison & Ross, Inc. 1973) pp. 13-14.) In addressing this point, it has been observed that the contention is contrary to sound policy for the following reasons:

> ". . . . An occasional suggestion may be found to the effect that emission must be established. If the theory back of this idea was pressed far enough it might reach the point of recognizing the effective use of a contraceptive as a complete defense to a prosecution for either rape or carnal knowledge of a child. It is safe to assume that no court would go this far. In fact, the premise itself is false. The sound rule which prevails very generally, if not uniformly today, is that emission is neither necessary nor sufficient to establish guilt in these cases. The essential element in this regard is

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[7]Similar fallacious reasoning was employed by the First Circuit in striking down New Hampshire's former statutory rape provision in *Meloon v. Helgemoe* (1st Cir. 1977) 564 F.2d 602, 607 fn.6, cert. den. 436 U.S. 950 (1978). Two years after deciding *Meloon*, the First Circuit upheld a virtually identical provision of Maine's law in *Rundlett v. Oliver* (1st Cir. 1979) 607 F.2d 495, raising a doubt as to the viability of the holding in *Meloon*. Although certiorari was denied in *Meloon*, 436 U.S. 950, it was noted that "THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN would grant . . . and reverse summarily, notwithstanding the new statute."

sexual penetration . . . .'' (Footnotes omitted; Perkins, *Criminal Law* (2d Ed. 1969) p. 155.

Based upon the foregoing, respondent submits that the classification scheme is clearly and substantially related to the prevention of teenage pregnancy.

II.

THE UNIQUE POTENTIAL FOR PHYSICAL INJURY TO THE IMMATURE FEMALE FROM SEXUAL INTERCOURSE JUSTIFIES THE STATUTORY CLASSIFICATION.

Petitioner argues that because some members of the class of protected victims are too young to conceive, California Penal Code section 261.5 cannot be sustained only on the theory it is intended to prevent teenage pregnancy.[8] (Brief of Petnr., p. 18.) However, as to the pre-pubescent girls physically incapable of conception, the classification in the statute is justified based upon the fact that the young female

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[8]Petitioner mentions at several points in his brief that the prevention of pregnancy is the only asserted purpose for the statute. (Brief of Petnr., pp. 13, 17.) To the extent petitioner is referring to the opinion of the Supreme Court of California, his position is accurate. The state court found the prevention of teenage pregnancy to be a ''compelling state interest,'' and its analysis went no further than to recognize that justification for the statutory classification. (*Michael M. v. Superior Court* (Cal. 1979) 25 Cal.3d 608, 612, 601 P.2d 572.)

The position taken by respondent below was not similarly limited. Respondent below also urged the constitutionality of California Penal Code section 261.5 on the following grounds: (1) as applied to the forcible conduct fairly reflected in the preliminary hearing transcript (App. 21-22, 32-33), the statute promoted the state's interest in prohibiting forcible intercourse (Return to Alternative Writ of Prohibition and Memorandum of Points and Authorities, pp. 6-8); (2) the sexes are not similarly situated for purposes of California Penal Code section 261.5, therefore identical treatment is not required (*id.*, at pp. 8-11); and (3) the ''prevention of physical harm from the sex act itself'' is a compelling state interest which justifies the statutory classification (*id.*, at p. 29). Although the Supreme Court of California did not proceed in its analysis beyond the recognition of pregnancy prevention as a compelling state interest, respondent does not abandon these additional grounds in support of affirmance.

is uniquely and exclusively susceptible to physical damage resulting from sexual intercourse. (*State v. Rundlett, supra*, 391 A.2d at p. 822; *Rundlett v. Oliver, supra*, 607 F.2d at p. 502; *People v. Dozier, supra*, 424 N.Y.S.2d 1010, 1014.)[9]

Moreover, the incidence of sexual abuse of younger females appears to be far greater than that of young males. In one reported study 86 of 100 children examined in a hospital emergency room over a three-year period were girls. (Orr and Prietto, *Emergency Management of Sexually Abused Children*, 133 Amer. J. Dis. Child, pp. 628-629 (June 1979).) A group of five studies all found approximately 88% of minor sexually abused victims to females. (Jaffe, Dynneson & Ten Bensel, *Sexual Abuse of Children*, 129 Amer. J. Dis. Child, p. 690 (1975).) Thus the assumption that young females are more likely to be the victims of sexual abuse is not merely an unsupported supposition but instead is a demonstrable fact which justifies the special protection afforded physically immature females. The gender based classification in California Penal Code section 261.5 "is a 'proxy' sufficiently accurate for restricting potentially physically injurious sexual intercourse via its criminal sanction," and the state is justified in sub-

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[9]In *State v. Rundlett, supra*, 391 A.2d at p. 819 fn.13, the court quoted from a study of rape victims indicating that while older females rarely suffered injury to the genitals, such injuries are quite common in young adolescent females and include abrasions, hymenal transections, first degree vaginal tears and perianal tears. Thus even if the "doubtful assumption" of similarity of occurrence of molestation for young males and females is accepted, the significant greater risk of physical injury to the young female constitutes an important governmental interest which supports the statutory classification. (*Id.*, at pp. 819-820 fn.16.)

jecting only male offenders to its criminal liability. (*Rundlett v. Oliver, supra,* 607 F.2d at p. 503.)

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III.

THE STATUTE DOES NOT VIOLATE EQUAL PROTECTION AS APPLIED TO PETITIONER.

Petitioner questions the constitutionality of California's unlawful sexual intercourse provision on the ground that it "arbitrarily holds the male criminally culpable even though the female may be older, more mature or herself the sexual aggressor." (Brief of Petnr., p. 12; see also Brief of Amicus Curiae Amer. Civ. Lib. Un. pp. 28-37.) Since the statute is being employed in the instant case in the context of forcible conduct, which the state can clearly regulate under its police power, and not in the unusual circumstances posited by petitioner, the statute is constitutional as applied.

California Penal Code section 261.5 applies on its face to forcible and consensual conduct, in that it prohibits "an act of sexual intercourse" with a female under the age of 18.[10] In the instant case, the only evidence presented indicates that the victim, Sharon, age 16, submitted to an act of sexual intercourse with petitioner, age 17, after being struck in the face two or three times. (App. 21-22.) Certainly the State of California has an important governmental interest in protecting young females from forcible intercourse and risk of pregnancy, regardless of the age of the male.

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[10]As applied to forcible conduct, the same act of intercourse could therefore constitute forcible rape (Cal. Pen. Code §261), unlawful sexual intercourse (Cal. Pen. Code §261.5), and if the victim was under the age of 14 years, lewd and lascivious acts upon the body of a child under the age of 14 (Cal. Pen. Code §288(a)).

California Penal Code section 261.5, as applied in the instant case is clearly constitutional.[11]

In view of the factual setting of the instant case, petitioner lacks standing to challenge the statute as applied to a situation in which the minor female is older than the male participant in the act of intercourse and is herself the aggressor. That hypothetical scenario is not before the Court and the statute's application to those facts need not be considered. (*Ulster County Court v. Allen, supra*, 442 U.S. at pp. 155-156.) If and when a prosecutor in California commences a prosecution upon the improbable factual pattern suggested by petitioner, the constitutionality of the statute as so applied can then be considered.

Indeed, California's unlawful sexual intercourse provision is applied in a variety of contexts, in addition to where force is used, in which the state's interest is manifest. For example, the statute has recently been applied to an acts of intercourse by a pimp with 15-year old prostitutes. (*People v. Dunn* (1980) 107 Cal.App.3d 138, 142, 165 Cal.Rptr. 574.) The statute has also been utilized in a case in which a youth facility supervisor engaged in intercourse with a minor trustee. (*People v. Rocca* (1980) 106 Cal.App.3d 685, 688, 165 Cal.Rptr. 226.) Another application of the statute has involved an act of intercourse during the filming of a pornographic movie. (*People v. Lewis* (1952) 113 Cal.App.2d 468, 469, 248 P.2d 461; *People v. Zeihm* (1974) 40 Cal.App.3d 1085, 1088, 115 Cal.Rptr. 528.) Finally,

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[11]Indeed, forcible conduct has been present in several cases upholding statutory rape provisions. (See, e.g., *In re Interest of J.D.G., supra*, 498 S.W.2d at pp. 793; *State v. Drake, supra*, 219 N.W.2d at p. 494; *People v. Salinas, supra*, 551 P.2d at pp. 704-705; *State v. Brothers, supra*, 384 A.2d at p. 403.) Even the aberrant holding in *Meloon v. Helgemoe* (1st Cir. 1977) 564 F.2d 602, recognized that its "analysis is predicated on the consensual nature of the crime committed by appellee." (*Id.*, at p. 605 fn.4.)

application of the statute to situations in which a male exercises dominance over the minor female due to some relationship, such as teacher-student or stepfather-daughter, (*People v. Alva* (1979) 90 Cal.App.3d 418, 421, 153 Cal.Rptr. 644; *People v. Fritts* (1977) 72 Cal.App.3d 319, 323, 140 Cal.Rptr. 94), clearly promotes important, if not compelling governmental interests. Respondent urges the Court to uphold the validity of California Penal Code section 261.5 as constitutionally applied to forcible conduct in the instant case, and to reject analysis of the statute as applied in hypothetical situations.

CONCLUSION.

For all the foregoing reasons, respondent respectfully urges the Court to uphold the constitutionality of California Penal Code section 261.5.

Respectfully submitted,

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